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No. 65, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF TEXAS,
Plaintiff

v.

STATE OF NEW MEXICO,
Defendant

UNITED STATES OF AMERICA,
Intervenor

NEW MEXICO'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

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EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

The State of New Mexico objects to the Report and Recommendations of the Special Master, accepted for filing October 18, 1982.

1. New Mexico objects to the Master's recommendation (at 2-3) that the Court vest in the United States representative to the Pecos River Commission, or in a third party, the power to vote as a tie breaker on the Commission, because that recommendation, which is comparable to the appointment of an arbiter, would have the Court rewriting the Compact. The compacting states, with congressional approval, established the voting power on the Commission in Article V of the Pecos River Compact. Judicial rewriting of the voting provisions in the

Compact would be an unauthorized intrusion on the legislative power and on the agreement between the sovereign states.

2. New Mexico objects to the Master's action vacating Paragraph 4(b) of the Pre-Trial Order (see pp. 10-11 of Master's Report and Recommendations) because the Master, in so doing, prematurely eliminated from the case the justiciable issues concerning the Commission's findings of fact. The Pecos River Commissioners unanimously made findings of fact in 1962. In filing this lawsuit, Texas repudiated the findings. Paragraph 4(b) of the Pre-Trial Order specified the issues Texas raised in challenging the basis of the findings. Texas still contests the validity of the Commission's findings of fact and their basis. The Master, therefore, erred in deciding to end his review of the findings the Commission had made.

3. New Mexico, in the alternative, objects to the Master's recommendation (at 2) that the Court deny New Mexico's motion to dismiss. After the Master vacated Paragraph 4(b) of the Pre-Trial Order, New Mexico moved to dismiss the case because there was nothing left for the Court to review. The Master, having eliminated judicial review of the Commission's findings of fact from the case, could not go on to make findings of fact for the Commission because he would be exceeding the judicial power under Article III of the U.S. Constitution. The Master agreed (at 22-23) but nevertheless recommends denial of the motion to dismiss. The Court may not, however, retain the case if it has no further judicial function.

New Mexico thus urges the Court to reject the Master's recommendation to give a third party voting power on the Pecos River Commission. New Mexico further asks that the Court return the case to the Master with direction to complete the judicial review of the findings of fact that the Pecos River

Commission made. In the alternative, New Mexico urges the Court to dismiss the case and to allow the matter to return to the Commission.

Respectfully submitted,

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BRIEF IN SUPPORT OF EXCEPTIONS

QUESTIONS PRESENTED

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1. Whether the Court may rewrite the voting provisions of Article V of the Pecos River Compact to provide for a tie-breaker, thus diluting the voting strength of the party states, eliminating the Compact's requirement of unanimity and foreclosing the right of each state to veto Commission action.

2. Whether the Court should review findings of fact the Commission made in 1962 where Texas, the plaintiff, disputes their validity and the validity of the Review of Basic Data on which they are based.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	1
A. The First Twenty-Five Years of Compact Administration	1
B. The Litigation	8
ARGUMENT	14
Summary of Argument	14
I. The Court may not rewrite the Pecos River Compact by changing critical voting provisions because it would be invading the legislative power and state sovereignty	15
II. The Master erred in concluding the Court could offer no relief other than rewriting the Compact because the Court can and should decide the justiciable disputes before it	26
A. The Court should direct the Master to review the Commission's findings of fact	27
B. If the Master does not review the Commission's findings, there is nothing left for the Court to review and the Court should return the matter to the Commission	32
CONCLUSION	37
APPENDIX	A-1

TABLE OF AUTHORITIES

Page

CASES:

Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) 19

Colorado v. Kansas, 320 U.S. 383 (1943) 21

Dandridge v. Williams, 397 U.S. 471 (1970) 18

Federal Communications Commission v. Schreiber, 381 U.S. 279 (1965) 34

Federal Power Commission v. Idaho Power Co., 344 U.S. 17 (1952) 34

Federal Radio Commission v. General Electric Co., 281 U.S. 464 (1930) 33

Gateway Coal Co. v. Mine Workers of America, 414 U.S. 368 (1974) 19

Gordon v. United States, 117 U.S. 697 (1864) 18

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 20

Holtzman v. Schlesinger, 414 U.S. 1304 (1973) 34-35

Keller v. Potomac Electric Power Co., 261 U.S. 428 (1923) 33

Labine v. Vincent, 401 U.S. 532 (1971) 18

Public Service Commission v. Havemeyer, 296 U.S. 506 (1936) 34

Rees v. Watertown, 86 U.S. (19 Wall.) 107 (1874) 18, 19

SEC v. Chenery Corp., 318 U.S. 80 (1943) 33

Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942) 18, 19

TABLE OF AUTHORITIES (Continued)

Page

Texas v. New Mexico, S.Ct. Original No. 65, Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact (filed Oct. 15, 1979), *aff'd*, 446 U.S. 540 (1980) 2, 3, 9, 24, 30

United States v. Sisson, 399 U.S. 267 (1970) 18

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 19

Vermont v. New York, 417 U.S. 270 (1974) 34

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) ... 17, 19, 33-34

West Virginia ex rel. Dyer v. Sims, 341 U.S 22 (1951) 16, 20, 21, 27

Wyoming v. Colorado, 259 U.S. 419, 260 U.S. 1 (1922) 26

Wyoming v. Colorado, 286 U.S. 494 (1932) 26

Wyoming v. Colorado, 298 U.S. 573 (1936) 26

Wyoming v. Colorado, 309 U.S. 572 (1940) 26

Wyoming v. Colorado, 353 U.S. 953 (1957) 26

British Airways Board v. Port Authority of New York and New Jersey, 564 F. 2d 1002 (2d Cir. 1977) 17-18

California ex rel. Younger v. Tahoe Regional Planning Agency, 516 F. 2d 215 (9th Cir.), *cert. denied*, 423 U.S. 868 (1975) 16-17, 19, 22

D.C. Transit System v. Washington Metropolitan Area Transit Commission, 350 F. 2d 753 (D.C. Cir. 1965), *cert. denied*, 389 U.S. 847 (1967) 28

TABLE OF AUTHORITIES (Continued)

Page

Williams v. Washington Metropolitan Area Transit Commission, 415 F. 2d 922 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969) 28

Brown v. Tahoe Regional Planning Agency, 385 F. Supp. 1128 (D. Nev. 1973) 28

Protestants and Other Americans United for Separation of Church and State v. O'Brien, 272 F. Supp. 712 (D.D.C. 1967) 35

Moreira Construction Co. v. Township of Wayne, 98 N.J. Super. 570, 238 A. 2d 185 (1968) 19

CONSTITUTION AND STATUTES:

United States Constitution, Article III 1, 13, 14, 33, 35

28 U.S.C. §1251(a) 1

Pecos River Compact, 63 Stat. 159 (1949), §72-15-19 N.M.S.A. 1978, Tex. Water Code Ann. tit. 3, §43.010 (Vernon 1972) ..... *passim*
Article II 2
Article III 2, 3, 4, 20, 28
Article IV 3, 20
Article V 3, 4, 15, 19, 20, 22, 23, 27, 28, 29, 35, 36
Article VI 2, 4, 10, 35

Arkansas River Basin Compact, 80 Stat. 1409 (1966) 23

Belle Fourche River Compact, 58 Stat. 94 (1944) 23

Big Blue River Compact, 86 Stat. 193 (1972) 23

Canadian River Compact, 66 Stat. 74 (1952) 23

Costilla Creek Compact, 60 Stat. 246 (1946) 23

La Plata River Compact, 43 Stat. 796 (1925) 23

TABLE OF AUTHORITIES (Continued)

Page

Rio Grande Interstate Compact, 53 Stat. 785 (1939) 23

Snake River Compact, 64 Stat. 29 (1950)..... 23

Yellowstone River Compact, 65 Stat. 663 (1951) 23

OTHER AUTHORITIES:

S. Doc. No. 109, 81st Cong., 1st Sess. (1949) ..... *passim*

S. Rep. No. 192, 85th Cong., 1st Sess. (1957) 1, 2

Hearing on S.J. Res. 155 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 84th Cong., 2d Sess. (1956)..... 1, 2

Bell and Adamson, "Notes on the Situation," 462 The Annals of the American Academy of Political and Social Science 16 (July 1982) 20, 25

Council of State Governments, INTERSTATE COMPACTS AND AGENCIES (1979)..... 22

Frankfurter and Landis, "The Compact Clause of the Constitution — A Study in Interstate Adjustments," 34 Yale L.J. 685 (1925)..... 21

Leach, "The Federal Government and Interstate Compacts," 29 Fordham L. Rev. 421 (1961)..... 22, 25

Leach and Sugg, THE ADMINISTRATION OF INTERSTATE COMPACTS (1959) 7-8, 21, 22, 23

Muys, INTERSTATE WATER COMPACTS (1971)..... 23

Zimmerman and Wendell, THE LAW AND USE OF INTERSTATE COMPACTS (1976) 22, 23

JURISDICTION

The original jurisdiction of the Court was invoked under Art. III, Section 2, Clause 2 of the Constitution of the United States and 28 U.S.C. §1251(a).

STATUTE INVOLVED

The Pecos River Compact, 63 Stat. 159 (1949), §72-15-19 N.M.S.A. 1978, and Tex. Water Code Ann. tit. 3, §43.010 (Vernon 1972). A copy of the Pecos River Compact appears in the Appendix to this brief.

STATEMENT OF THE CASE

A. The First Twenty-Five Years of Compact Administration

The Pecos River rises in New Mexico, flows into Texas and joins the Rio Grande. Although it is a small river, "it has all of the problems that any big river ever had and has some problems peculiar unto itself."[1] The Pecos River is continually changing. S. Doc. No. 109 at xxv.[2] The flow of the water at any particular point in the river does not bear a straight-line relation to the inflow or depletions of water in the river above that point. S. Doc. No. 109 at xxxiii-iv. As the Master here noted, "the inconstancy of rainfall and the geologic conditions of the Pecos

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[1] Hearing on S. J. Res. 155 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 84th Cong., 2d Sess. 8 (1956). *See also* S. Doc. No. 109, 81st Cong., 1st Sess. 2 (1949); S. Rep. No. 192, 85th Cong., 1st Sess. 4 (1957).

[2] "S. Doc. No. 109" refers to the Senate document published in 1949, 81st Congress, 1st Session, and containing the Pecos River Compact together with the Report of the Engineering Advisory Committee to the Pecos River Compact Commission. "Stip. Ex." refers to Stipulated Exhibit. "Tr." refers to the transcript of the proceedings before the Master. The number preceding the "Tr." is the volume; the number following it is the page.

Basin present unique complications. . . . 'In fact, in the absence of flood inflows, the normal basic flow is entirely lost and reestablished many times in the length of the stream.' "[3] The engineering advisory committee told the Pecos River Commission in November 1948 before ratification of the Compact: "This committee does not know what the ordinary flow of the Pecos River is. . . ." S. Doc. No. 109 at 85.

Besides the inconstancy of the ordinary flow, the Pecos River suffers frequent and destructive floods which ruin the channels and fill the reservoirs with silt. The river suffers recurring drought. Water loving plants grow rapidly along the river and consume unusually large amounts of water. In addition, water quality is poor. *E.g.*, Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact at 5-6 (filed Oct. 15, 1979), *aff'd*, 446 U.S. 540 (1980); Hearing on S. J. Res. 155, *supra* note 2 at 8; S. Doc. No. 109 at 2; S. Rep. No. 192, *supra* note 2 at 4.

Because the river is so difficult, the Pecos River Compact is complex; it requires detailed and continuous administration. The Pecos River Compact apportions Pecos River water between Texas and New Mexico and gives the states a way to work together to solve some of the river's problems. Because allocation of Pecos River water on a straight-line percentage basis was neither practical nor feasible, *e.g.*, S. Doc. No. 109 xxxiii, the parties agreed to divide the waters on the basis of the "1947 condition" and to administer the agreement by means of a detailed inflow-outflow accounting method. Pecos River Compact, Articles II, III, VI. The Compact established the Pecos River Commission and directed it to administer the apportionment of water under the Compact and to collect data

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[3]Report and Recommendations at 6 (filed Oct. 18, 1982), quoting in part from Stip. Ex. 11(b) at 12 (1942 Report of the National Resources Planning Board) (emphasis omitted).

and conduct wide-ranging studies of the Pecos River. Article V. The Compact also committed the states to act jointly to salvage water and improve water quality. Article IV.

After the Pecos River Compact was approved in 1948 and enacted into law in 1949, the Pecos River Commission began promptly to analyze and administer the river. The Commissioners agreed upon and established gaging stations. They authorized aerial photography for mapping. They undertook a study of groundwater movement in the area. They investigated the possibility of stopping the brine inflow in the Malaga Bend area. They examined the salt cedar problem in the McMillan delta and in the Acme to Artesia reach of the Pecos River, and obtained congressional authorization for channelization works on the Pecos River. *E.g.*, Stip. Ex. 4 at 21-24, 29, 42-44, 49, 60-62, 83-84 (Commission meetings, Jan. 19, 1950, Aug. 14, 1950, May 17, 1951, Jan. 17, 1952, Jan. 22, 1953, May 12, 1954).

Commission efforts to administer the apportionment of water under Article III(a) of the Pecos River Compact, on the other hand, were stymied at the outset because of mistakes, omissions and inconsistencies in the 1947 routing study and the accompanying inflow-outflow manual that had been developed to guide administration of the Compact. Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact at 16 (filed Oct. 15, 1979), *aff'd*, 446 U.S. 540 (1980); Master's Report and Recommendations at 6 (filed Oct. 18, 1982). *See also* Stip. Ex. 4 at 7-8 (Commission meeting, Dec. 9 & 10, 1949). As John Erickson, Engineering Advisor to the New Mexico Commissioner from 1947-1955, later testified: "Problems were quickly apparent because there was an immediate negative departure which was startling. There was no known cause at that early date because no known changes had taken place on the river." Synopsis of Testimony of John R.

Erickson Pursuant to Paragraph 5(c), Trial Procedures of the Special Master's Pre-Trial Order of October 31, 1977, at 2 (Feb. 1978). It became apparent that corrections should be made. Stip. Ex. 4 at 234 (Commission meeting, Jan. 31, 1961, containing Joint Memorandum of Pecos River Commissioners, dated Aug. 23, 1960, which reviewed in part the Commission history).

The Commission directed its engineers, under Articles V(d) and VI(a) of the Compact, to undertake the examination needed to make corrections for apportioning Pecos River water under Article III of the Compact more accurately. Pending completion of the work it held in abeyance the making of any findings of fact for administering the apportionment of the river. Stip. Ex. 4 at 59, 76, 174 (Commission meetings, Jan. 22, 1953, Feb. 15, 1954, July 29, 1957); Stip. Ex. 2 at 38, 46 (Engineering Advisory Committee meetings, Jan. 21, 1953, Jan. 4-5, 1954). The work took almost ten years. In the meantime, however, years of additional data, including rainfall and stream flow records, became available. In addition, electronic digital computers became available. Stip. Ex. 4 at 234-36 (Commission meeting, Jan. 31, 1961). The delay thus provided scientific benefits.

Finally, the engineers completed the work and produced their Report on the Review of Basic Data (hereinafter "Review of Basic Data"), which the Commission on January 31, 1961 adopted under Article V(d) of the Compact as "amendments, refinements and additions to the basic data of the Commission and considered as such in all actions and findings of the Commission, and as representing the best information on the subjects covered thereby." Stip. Ex. 4 at 247. Using the Review of Basic Data, the Commission made findings of fact in 1961 on deliveries of water at the state line from 1950-1959 and found no deficiencies in the supply to Texas.[4] Stip. Ex. 4 at 247, 241-42.

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[4]The figures did not reflect the depletion, if any, that might have been caused by pumping of water below Carlsbad. Stip. Ex. 4 at 242.

In 1962, the Commission completed, corrected and extended its earlier findings of fact. Again, using the Review of Basic Data, the Commission made findings of fact on whether Texas had received the proper amount of water under the Compact for the period 1950-1961. The Commission decided Texas' supply had been deficient by only 5,300 acre feet over the entire twelve year period. It did not go on to consider whether that deficiency came from natural causes, for which New Mexico would not be responsible, or from beneficial use in New Mexico, for which New Mexico would be responsible. Stip. Ex. 4 at 256-57 (Commission meeting, Nov. 9, 1962).

After the Commission accepted the Review of Basic Data and the findings of fact based on the Review of Basic Data, the engineers proceeded to prepare an inflow-outflow manual. The manual was to contain the same procedures as in the Review of Basic Data. It was, however, to draw those procedures out to put them in a handbook form. That way the procedures could be more readily used for making annual findings in the future years. *See* Stip. Ex. 4 at 399 (Commission meeting, Jan. 28, 1971).

The task of completing the inflow-outflow manual was assigned to the Inflow-Outflow Subcommittee. By 1963 a draft of the inflow-outflow manual had been completed. In 1967 a draft was transmitted from the Inflow-Outflow Subcommittee to the Engineering Advisory Committee. In 1969 a revised draft inflow-outflow manual was submitted to the Engineering Advisory Committee. In addition, trial computations for findings of fact on water deliveries from 1962-1968 were submitted by the New Mexico engineer advisors to the Texas engineer advisors. Stip. Ex. 4 at 325, 354, 360 (Commission meetings, Nov. 6, 1968, Jan. 28, 1970, July 21, 1970); Stip. Ex. 2 at 262 (Engineering Advisory Committee meeting, Feb. 20, 1967).

Before the Engineering Advisory Committee finally acted on the inflow-outflow manual,[5] however, key people in the administration of the Compact died. Royce J. Tipton, who began as engineer advisor to the federal representative during Compact negotiations and was then hired at the request and upon the payment of both states to serve as engineer advisor to the Pecos River Commission and as chairman of the Engineering Advisory Committee, died on December 23, 1967, after almost thirty years of service on the Pecos River. In 1968, Mr. Wilson, Texas' Commissioner for nineteen years, died. Stip. Ex. 4 at 316-18 (Commission meeting, Nov. 6, 1968).

When the Commission met again in 1969 with the new Commissioners, cooperation on the Commission began breaking down. First, Texas Commissioner McGowen, without going through the Compact Commission or the Engineering Advisory Committee, asked the Texas staff for a unilateral engineering analysis of New Mexico's Compact delivery obligations. Stip. Ex. 4 at 369 (Commission meeting, July 21, 1970). Texas used for her analysis the 1947 routing study that had been rejected by the Commission at the outset of Compact administration as too full of error, omission and inconsistency to describe accurately the apportionment embodied in the Compact. Stip. Ex. 4 at 369, 471 (Commission meetings, July 21, 1970, Feb. 2, 1974). Texas' analysis claimed there was a 1,100,000 acre-foot deficit in the amount of water she had received and it was chargeable to New Mexico. Stip. Ex. 4 at 369, 471 (Commission meetings, July 21, 1970, Feb. 21, 1974). New Mexico was given an opportunity to review Texas' work, but with only enough time to check Texas' arithmetic. Stip. Ex. 4 at 383 (Commission meeting, Jan. 28, 1971). When New Mexico reminded the Texas Commissioner of the Commission's findings in 1961 and 1962, he replied that he

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[5]Between 1962 and 1967 the Commission's attention was turned to other matters, such as water salvage. *See generally* Stip. Ex. 4, Stip. Ex. 2.

was not a Commissioner then. Stip. Ex. 4 at 398 (Commission meeting, Jan. 28, 1971).

On January 29, 1970, Texas Commissioner McGowen also brought in a new lawyer to serve the Commission. That same day he asked the legal committee to review the legality of the Joint Memorandum of August 23, 1960, in which the Texas and New Mexico Commissioners had made agreements on administration of the river. Stip. Ex. 4 at 357 (Commission meeting, Jan. 29, 1970). For the first time in the history of the Compact, the legal committee was unable to render an opinion because its members could not reach agreement. Stip. Ex. 4 at 366 (Commission meeting, July 21, 1970).

The disputes continued and in early 1974 Texas Commissioner McGowen finally formally announced: "We repudiate the Review of Basic Data as a basis for Commission action in determining the amount of water to be apportioned to Texas under the Pecos River Compact, because the same has operated to deprive Texas of the water to which it is entitled. . . ." Stip. Ex. 4 at 472 (Commission meeting, Feb. 21, 1974). Texas, he announced, would "look elsewhere to obtain enforcement of its rights. . . ." Stip. Ex. 4 at 481 (Commission meeting, Feb. 21, 1974). Subsequently in 1974 and 1975, Texas, who held the chairmanship of the Engineering Advisory Committee, failed to call Engineering Advisory Committee meetings. She said there would be no point in meeting, for the proper forum was the Court, not the Commission. Stip. Ex. 4 at 490-91, 505 (Commission meetings, Feb. 20, 1975, March 11, 1976).

So ended the Commission function that during the first twenty years had led commentators to remark:

> [T]he Pecos Commission must be rated as a success . . . it was well received at the outset, and the Commission was

> able to begin operations free from the old grudges which have marred the work of other water allocation agencies. . . . The Commissioners have been chosen with care and have gone about their job with the conviction that the Compact can be effective in solving the water problems in the basin. The states have scrupulously honored the Compact and done everything to meet the Compact requirements.

Leach and Sugg, THE ADMINISTRATION OF INTERSTATE COMPACTS 166-67(1959).

B. The Litigation

Texas began this lawsuit against New Mexico in June of 1974, four months after she formally repudiated the Review of Basic Data. Motion for Leave to File Complaint, Complaint and Brief in Support of Motion. The Master appointed by the Court, after initial proceedings, decided on May 6, 1977 to remand the case to the Commission to give the parties until January 1, 1979 to resolve their differences. Report of Special Master on His Decision and Supplemental Decision Regarding the Affirmative Defenses of New Mexico to Complaint of Texas at 29 (issued July 6, 1977) (hereinafter cited as "1977 Report").

Texas objected to the Master's remanding the case to the Commission. 1977 Report at 31. Texas Commissioner McGowen called a special meeting of the Commission on June 16, 1977 and promptly moved that the Commission make eight findings on New Mexico's Brantley Dam, some of which would have required Compact amendment. The New Mexico Commissioner objected. The meeting lasted eighteen minutes. Stip. Ex. 4 at 524-41. Commissioner McGowen unilaterally arranged to have that transcript and a previous one sent to the

Master within days after the June 16 meeting. Upon receiving the transcript, the Master vacated his May 6 decision remanding the case to the Commission, denied all of New Mexico's affirmative defenses and directed the parties to prepare for trial. 1977 Report at 32-36.

In the first stage of the case, Texas challenged the Commission's authority to use the Review of Basic Data, which corrected information and data in the 1947 routing study, in lieu of the 1947 routing study, on which Texas had based her calculations.[6] That stage ended in 1980 when the Master concluded, in pertinent part, that the Commission did have the authority to make such corrections in order to better effect the apportionment under the Compact. The Supreme Court affirmed his decision. Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact (filed Oct. 15, 1979), *aff'd*, 446 U.S. 540 (1980).

Having failed to eliminate the Review of Basic Data altogether, Texas next challenged specific portions of the Review of Basic Data. Texas raised question about eleven ways in which the Review of Basic Data differed from the 1947 routing study on which Texas based her claims. Those eleven issues were set forth for consideration in Paragraph 4(b) of the Pre-Trial Order of October 31, 1977. The Master heard evidence on these issues in 1978, 7 Tr. 350 through 22 Tr. 2293, but did not make final conclusions. New Mexico and Texas, however, subsequently reached agreement on seven of the eleven issues; Texas accepted the Review of Basic Data for those seven issues. 24 Tr. 3293, 3314 (Hearing Oct. 20, 1980); Master's Exhibits 12, 17, 18 (Letters describing parties' agreements and disagreements); Affidavit of Carl L. Slingerland, dated Dec. 11, 1981,

[6]Texas pursued this challenge even though the Texas Attorney General had issued Opinion No. M-535 saying the Commission had acted within its prescribed powers in adopting the Review of Basic Data. Joint Ex. 12(a) (d).

paragraph 9 (Affidavit attached to New Mexico's Objections to Special Master's Order of December 1, 1981, dated Dec. 15, 1981).

Texas was then to produce reports in early 1980 on the remaining Paragraph 4(b) issues. Master's Exhibit 10. Texas did not do so. On January 14, 1981 the Master finally ordered Texas to file its final statement on the remaining Paragraph 4(b) issues by April 14, 1981. Again, Texas did not do so. Master's Report and Recommendations at 10 (filed Oct. 18, 1982) ("Texas did not state its position on the [Paragraph] 4(b) issues as it had been required to do in the Master's January 14 order"). Instead, Texas proposed to the Master an altogether new method of Compact administration known as the double mass method. Texas' Paragraph 4(b) Submission (dated April 13, 1981).

New Mexico objected to Texas' action in proposing the double mass method to the Court. New Mexico pointed out that under Article VI of the Pecos River Compact, the proposed new method of Compact administration could be properly addressed only by the Pecos River Commission, not the Court. Article VI (c) provides, in pertinent part: "unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method, as described in the Report of the Engineering Advisory Committee, shall be used . . . ." Adoption of the proposed new method would require unanimous action by the Commission, as took place when the Commission adopted the Review of Basic Data. *E.g.*, Master's Exhibit 21 (Letter of June 5, 1981 from Richard A. Simms, counsel for New Mexico, to the Honorable Jean S. Breitenstein).

The Master heard argument on this issue on July 27, 1981. He did not then rule on it, but instead ordered the parties to present evidence at a hearing on Texas' proposed new method, to begin within one month, on August 24, 1981. 35 Tr. 3384 l.6-8. After hearing comment on his order, the Master proposed an

alternative order: that the parties instead "show cause on or before August 15 why the case should not be dismissed on the ground the Compact is not workable." 35 Tr. 3388-89. Finally, he settled upon an order directing the parties to negotiate for ninety days to see if they could reach a settlement; if they could not, each party would have to file a statement showing cause why the action should not be dismissed on the ground that performance of the Pecos River Compact was impossible. Order of August 6, 1981.

The parties were not able to reach settlement in ninety days, Joint Report to the Court (dated Oct. 27, 1981); so, in accordance with the Master's order, the parties briefed and argued the issue of whether the Compact was workable. Both states contended the Compact was workable. New Mexico's Memorandum on Impossibility of Performance (dated Nov. 18, 1981); Texas "Workability" Statement (dated Nov. 18, 1981). At oral argument on the issue on November 30, 1981, the Master unexpectedly announced that he proposed to vacate Paragraph 4(b) of the Pre-Trial Order, 36 Tr. 3408 l. 2-5; and on the next day, December 1, 1981, the Master entered an order both vacating Paragraph 4(b) of the Pre-Trial Order and setting trial to begin in a month, on January 4, 1982, to hear evidence "with regard to the preparation and submission to the Special Master of a new Inflow-Outflow Manual."

Despite the questions and objections of the parties,[7] the Master retained his order vacating Paragraph 4(b) of the Pre-Trial Order and insisted "the Review of Basic Data [is] out for the purposes of this case." 37 Tr. 3455 l. 12-14 (Hearing of Dec. 21, 1981); *see also* Order of Dec. 29, 1981. The Master did, however, change the time and purpose of trial. This time he set

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[7]New Mexico's Objections to Special Master's Order of December 1, 1981 (dated Dec. 15, 1981); Texas' Motion for Clarification of Master's December 1, 1981, Order and Motion for Continuance (dated Dec. 14, 1981).

trial for March 8, 1982 on the "basic facts, unmeasured values and techniques" to be used for determining stream flows. Order of Dec. 29, 1981. Thus, the case which had begun with a unilateral repudiation of the joint action of the Pecos River Commission in using the Review of Basic Data to effect more accurately the agreed-upon division of water under the Compact, and which continued to challenge the Commission's use of the Review of Basic Data, officially turned away from the Review of Basic Data on the order of the Master.

In the March 1982 trial, Texas presented evidence on alternative methods of Compact administration. First, she moved the Court to use the double mass method and she presented evidence on that point. In response, New Mexico opposed the use of the double mass method, both on legal and evidentiary grounds. 38 Tr. 3486 through 40 Tr. 3940 (March 8-10, 1982); Texas' Motion to Use the Double Mass Inflow-Outflow Method to Account for Stream Flows in the Determination of the 1947 Condition Base Relationship, and supporting Memorandum (dated Jan. 15, 1982); New Mexico's Response to Texas' Motion to Substitute Texas' Double Mass Procedure for the River Routing Study Under the Compact (dated Feb. 19, 1982).

Secondly, even though the Master had officially eliminated the Review of Basic Data Paragraph 4(b) issues from the case, Texas presented evidence on the Review of Basic Data and on her remaining objections to the Review of Basic Data. New Mexico responded with evidence on the Review of Basic Data issues[8] but also with a motion to dismiss. Motion to Recommend Final

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[8]40 Tr. 3940 through 43 Tr. 4393 (March 10-15, 1982); Texas Exhibit 48 (Texas' Statement on Basic Facts, Unmeasured Values and Techniques, Jan. 15, 1982); New Mexico Exhibit 54 (New Mexico's Statement Regarding Basic Facts, Unmeasured Values and Techniques for Determining Stream Flow as Required by the Special Master's Dec. 29, 1981 Order, dated Feb. 19, 1982).

Decree and to Dismiss, and supporting Memorandum (dated Feb. 19, 1982). New Mexico moved to dismiss because the Master, having eliminated the Review of Basic Data from the case, could not proceed to make *de novo* the administrative findings and decisions delegated to the Pecos River Commission; to do so would exceed the judicial power under Article III of the Constitution.

After the hearing, the Master issued his Report and Recommendations. He did not rule on the evidence presented. Instead, his key recommendation was that the Court vest in a third party the power to vote to break ties on the Commission and that the Court retain jurisdiction but order the states to return to the Commission for performance of its duties. The question of the Court installing a third party tie-breaker on the Commission had not been previously raised in the case and was not briefed before the Master.

The Master also recommended that New Mexico's motion to dismiss be denied and that Texas' motion to substitute the double mass method for that in the Compact be denied without prejudice to Commission consideration of such a method. The Supreme Court accepted the Master's Report and Recommendations for filing October 18, 1982 and invited the parties to submit their exceptions and objections. Order of Oct. 18, 1982.

ARGUMENT

Summary of Argument

The Master's key recommendation to the Court in this case is that the Court vest in a third party the power to vote as a tie-breaker on the Pecos River Commission. Under the Pecos River Compact, which established the Pecos River Commission, only Texas and New Mexico may vote on the Commission; the third party, the federal representative, is specifically prohibited from voting. In proposing that the Court now give the federal representative or some other third party voting power on the Commission, the Master is in effect recommending that the Court rewrite the Pecos River Compact. The Compact is a solemn agreement between sovereign states, enacted into law in both states and sanctioned by Congress. It is not within the judicial power to rewrite the Compact. The parties may amend the Compact, if they so desire, but the Court may not rewrite it. The Court would be exceeding its judicial authority and invading the legislative power and state sovereignty if it did so.

Although the Court may not rewrite the Compact, the Court should, consistent with its judicial powers, review the findings of fact the Commission made in 1962 and the Review of Basic Data, on which the findings were based. Texas repudiated the Review of Basic Data in 1974 and was still contesting portions of it in March of 1982. The Master, however, has declined to consider or rule on the Review of Basic Data issues even though Texas still contests them. The Master should be directed to proceed with judicial review of the Review of Basic Data and the findings of fact, so long as Texas continues to question the validity of the Review of Basic Data and the Commission's findings of fact. Alternatively, if the Court decides it need not review the Commission's findings, it should dismiss the case for the Court may not, under Article III of the United States Constitution, make on its own the administrative findings delegated by the Compact to the Pecos River Commission.

I.

THE COURT MAY NOT REWRITE THE PECOS RIVER COMPACT BY CHANGING CRITICAL VOTING PROVISIONS BECAUSE IT WOULD BE INVADING THE LEGISLATIVE POWER AND STATE SOVEREIGNTY.

The Pecos River Compact is an agreement between Texas and New Mexico, and the agreement is a binding one. New Mexico agreed to limit her use of Pecos River water in reliance on the terms she negotiated in the Compact. States enter these agreements carefully, solemnly, and expect their terms to be respected. The proper role of the courts should be to make the states adhere to the bargain they struck.

The difficulty here is that Texas became dissatisfied with the terms of the bargain she struck. Texas does not want to get out of the Compact altogether, for she still wants to bind New Mexico to the Compact's limits on New Mexico's use of water. In pursuing this lawsuit Texas just wants to improve her position. The proper place for Texas to seek amendment of the Compact is in the state legislatures, not the Court.

The Master has nevertheless recommended that the Court rewrite the Compact. The Pecos River Compact gives each state a vote on the Commission but denies voting power to the federal representative.[9] The Master proposes that the Court give voting power to the federal representative or to some third party.

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[9]The Pecos River Compact states that the United States representative to the Pecos River Commission "shall not have the right to vote in any of the deliberations of the Commission." Article V(a). The Commission's Rules of Internal Organization repeat that restriction in two places; they emphasize that the Commissioner representing the United States "shall not have the right to vote." Article II, Clause 2 and Article IV, Clause 8, Stip. Ex. 4 at 9, 11-12, 18,

Report and Recommendations at 2-3 (filed Oct. 18, 1982). The proposed change is directly contrary to the terms of the Compact. If the legislatures wanted to make this change, they could. The Court, however, may not. It does not have the authority to rewrite an interstate compact, approved by two state legislatures and sanctioned by Congress.[10]

In *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), a key case in interstate compact law, the Court considered a closely analogous situation. There, the West Virginia Supreme Court of Appeals had decided that West Virginia, although a signatory state, was not properly a party to a multistate compact to control pollution in the Ohio River system. The effect of the state court decision was to revise a critical and express element of the Compact: the interstate membership. The United States Supreme Court reversed the state court's ruling, saying the state court could not so nullify "an agreement solemnly entered into between States." 341 U.S. at 28. If the state court may not nullify an agreement solemnly entered into between states, neither may a federal court nullify an agreement by rewriting its terms.

The United States Court of Appeals for the Ninth Circuit not long ago ruled that courts are not empowered to rewrite compacts. *California ex rel. Younger v. Tahoe Regional Planning Agency*, 516 F. 2d 215 (9th Cir.), *cert. denied*, 423 U.S. 868 (1975). In that case California sued to stop construction of a hotel-casino which had been deemed approved

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38, 120, 209, 212 (Commission meetings on Dec. 9-10, 1949, Jan. 18, 1951, Jan. 24-25, 1956, and Oct. 27, 1960, promulgating, extending and repromulgating the rules). Only the New Mexico Commissioner and the Texas Commissioner have that right. Pecos River Compact, Article V(a); Commission's Rules of Internal Organization, Article IV, Clause 8, Stip. Ex. 4 at 11-12, 18, 38, 120 and 212.

[10]Laws of New Mexico 1949, p. 31; Texas' General Laws 1949, p. 51; 63 Stat. 159 (1949).

because of the Tahoe Regional Planning Agency's failure to take action.[11] The Ninth Circuit rejected California's appeal and pointed out: "That the Compact may not be a powerful anti-growth measure in that it permits a majority of one state to stop effective action by the [agency] is not the result of a court imposed interpretation, but of deliberate action by the legislatures of Nevada and California and the Congress of the United States." 516 F. 2d at 220. California's remedy was to appeal to those legislatures. "This court," the Ninth Circuit concluded, "is not empowered to rewrite the Compact." 516 F. 2d at 220.

Interstate compacts are statutes and courts may not rewrite statutes. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519 (1978), the Supreme Court stopped a lower court from adding procedural requirements to those specified in the Administrative Procedure Act. The Act set the maximum procedural requirements which Congress was willing to have the courts impose on agencies. Courts may not, on their own notions of what is best, require procedures beyond those in the statute.[12]

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[11]Under the Tahoe Regional Planning Compact, a majority vote of the members of each state, California and Nevada, was required before the agency could act. If the agency failed to act on a project within sixty days, either approving or rejecting it, then the project would be deemed approved. At the agency meeting on the hotel-casino project, California's five delegates voted against the project and two of Nevada's five delegates voted against it as well; but the three remaining Nevada delegates voted for it. Although an absolute majority of the delegates voted against the project, the majority of each state did not vote against it. Because the states split on the issue, the agency, according to the Compact voting provisions, failed to act and the project was deemed approved.

[12]Courts may, of course, require compliance with constitutional constraints. The case the Master relies on in suggesting the Court rewrite the Pecos River Compact was one involving constitutional constraint: *British Airways Board v. Port Authority of New York and New Jersey,* 564 F.2d 1002 (2d Cir. 1977). Report and Recommendations at 18 (filed Oct. 18, 1982). There the Second Circuit upheld the lower court's order dissolving the Port

In *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), the Supreme Court reversed a lower court's decision in effect revising a statute because "it ignores the plain Congressional mandate . . . . If this mandate is to be changed, it must be changed by Congress, and not by the Courts."[13] 316 U.S. at 43. The Court refused to legislate. The Court similarly refused to legislate in *Rees v. Watertown*, 86 U.S. (19 Wall.) 107 (1874). There the Court decided it could not levy a tax on individual property to satisfy a city's debts contrary to a law prohibiting the levy of such a tax. A court of equity does not do justice by violating the law.[14]

The Court adheres to the choices Congress and state legislatures have made, even though it might have made those choices differently. *See e.g., Labine v. Vincent*, 401 U.S. 532, 538-39 (1971); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). A statute "is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." *United States v. Sisson*, 399 U.S. 267, 297 (1970). Courts, like the rest of society, are bound to honor the law and respect the limits of their jurisdiction.

Authority's ban on Concorde landings at Kennedy Airport. The Authority's delay in promulgating noise rules for Concorde flights was deemed an undue burden on interstate commerce. Although the court reversed the Authority's decision banning the flights pending the rulemaking, it did not attempt anything so fundamental as rewriting applicable legislation. The Master's reliance on the *Port Authority* case is misplaced because the case does not support the proposition that courts may rewrite statutes.

[13] There the question was whether seamen had a right to strike when the ship was moored in a safe port even though the statute required the crew to obey lawful commands of the ship's master "whether on board, in boats, or on shore . . . ." The lower court had decided that because the need for absolute authority was diminished when the ship was in a safe port, the seamen had the right to strike.

[14] "Were it [the judicial power] joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their own opinions and not by any fundamental principles of law . . . ." *Gordon v. United States*, 117 U.S. 697, 706 (1864).

Moreover, the Special Master's recommendation that the Court vest the United States representative on the Pecos River Commission or a third party with the power to vote to resolve any impasse on the Commission is analogous to appointing an arbitrator to resolve disputes. Courts may not appoint arbitrators and direct the arbitrator to resolve disputes between parties; the obligation to arbitrate is founded on contract and in the absence of agreement, the parties to a contract can not be compelled to submit a dispute to arbitration. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); *Gateway Coal Co. v. Mine Workers of America*, 414 U.S. 368, 374 (1974); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). The courts do not have the "right to rewrite [a] contract merely because . . . it might . . . have been functionally desirable" to make every dispute the subject of arbitration. *Moreira Construction Co. v. Township of Wayne*, 98 N.J. Super. 570, 238 A.2d 185, 189 (1968).

The Pecos River Compact is a law and courts must follow the law. The Compact prohibits the federal representative from voting. Article V(a). Only Texas and New Mexico vote on the Commission. A Court decision requiring the federal representative, or some third party, to vote would be rewriting the terms of the Compact contrary to the plain agreement and enactment of the states, as sanctioned by Congress. A court may not so legislate. *E.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Southern Steamship Co. v. NLRB*, and *Rees v. Watertown, supra.*

The Court's refusal to intrude on the legislative domain should be even stronger here, for the Compact is no ordinary piece of legislation. It is a binding agreement between two states, each "reluctant to relinquish very much sovereignty." *California ex rel. Younger v. Tahoe Regional Planning Agency*, 516 F. 2d 215, 220 (9th Cir.), *cert. denied*, 423 U.S. 868 (1975). The states take

great care to set Compact terms to protect their citizens, limiting and controlling their commitments. Under the circumstances, a court should take special care not to rewrite interstate compacts.

Rewriting the Pecos River Compact, if that is to be done, is the responsibility of the legislatures of Texas and New Mexico, not the courts. The states of Texas and New Mexico carry the responsibility of changing the voting provisions of the Compact if they think it wise.[15] The Court, by rewriting the Compact, would be intruding on the states' sovereignty and on the legislative power. The Court should, therefore, reject the Master's suggestion that it vest in the federal representative, or other third person, power to vote on the Commission when the states do not agree on the issues. As a matter of law, the Court should not rewrite the Pecos River Compact.

Refusing to rewrite the Compact is not only sound law but also sound policy, for a compact is a contract or treaty between quasi-sovereign powers, *e.g.*, *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31, 36 (1951); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938); and states entering compacts alter their positions in reliance on the binding nature of interstate compacts.[16] *E.g.*, *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 36 (1951) (concurring opinion). The Court has encouraged states to enter into interstate compacts, *e.g.*, *West Virginia ex rel. Dyer v. Sims*, *supra*, 341 U.S. at 26-27;

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[15]"[O]ur society has turned over to our judicial and quasi-judicial systems too many questions of public policy that timorous politicians are unwilling to handle themselves." Bell and Adamson, "Notes on the Situation," 462 The Annals of the American Academy of Political and Social Science 16, 18 (July 1982).

[16]New Mexico in the Pecos River Compact agreed to limit her beneficial use of the water in the future to that portion she would have received under the "1974 condition." In exchange Texas relinquished any claims she had in excess of that amount. Both states set strict terms on how the Compact would be administered. Pecos River Compact, Articles III and V. *See also* S. Doc. No. 109, 81st Cong., 1st Sess. xv (1949) ("The compact reflects a compromise") (letter from acting Secretary of Interior to Senate Committee on Insular Affairs).

Colorado v. Kansas, 320 U.S. 383, 392 (1943), because interstate disputes "present complicated and delicate questions. . . [requiring] expert administration rather than judicial imposition of a hard and fast rule." *Colorado v. Kansas, supra*, 320 U.S. at 392.[17]

Despite the encouragement, states approached interstate compacts and interstate compact agencies with suspicion. The degree of their distrust diminished, however, when the Court issued its decision in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), affirming the binding nature of the interstate compact. West Virginia's Supreme Court of Appeals there held that West Virginia's participation in an interstate compact with seven other states violated the state constitution. In the proceeding that followed, the United States urged the United States Supreme Court to read the Compact to allow any signatory state to withdraw from its obligation at any time. The Court refused to do so. It held the Compact binding on the signatory states and reversed the decision of the West Virginia Supreme Court of Appeals. Commentators remarked that "Thanks to the decision of the Supreme Court in the case of *West Virginia ex rel. Dyer v. Sims*. . . which tested West Virginia's membership in the Ohio River Valley Water Sanitation Compact, states may . . . proceed in the assurance they are on firm ground." Leach and Sugg, THE ADMINISTRATION OF INTERSTATE COMPACTS 12-13 (1959) (hereinafter cited as "Leach and Sugg").

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[17] Frankfurter and Landis early noted that interstate adjustments frequently are not amenable to a single, final, inflexible decree; they concluded that the interstate agreement which establishes an administrative agency for continuing study and action is "the legal institution alone adequate to the task" of managing interstate natural resources. "The Compact Clause of the Constitution — A Study in Interstate Adjustments," 34 Yale L.J. 685, 701 (1925).

Commitment to interstate compacts grew dramatically during the next few decades. Before 1920, there were only 36 interstate compacts. Between 1921 and 1940, states entered about 20 more. In the period between 1940 and 1975, however, the states negotiated over 100 additional compacts. Zimmerman and Wendell, THE LAW AND USE OF INTERSTATE COMPACTS ix (Introduction by Brevard Crihfield, Executive Director of Council of State Governments) (1976) (hereinafter cited as "Zimmerman and Wendell"). By 1979 there were about 175 interstate compacts, many with administrative agencies, used in an ever-expanding number of fields: pollution control, education, forest fire protection, fisheries research, flood control, water allocation, mass transportation, energy conservation, law enforcement and taxation, among them. *See generally* Council of State Governments, INTERSTATE COMPACTS AND AGENCIES (1979). Virtually every state in the Union became party to a compact. Leach, "The Federal Government and Interstate Compacts," 29 Fordham L. Rev. 421, 422 (1961). By the 1970's commentators felt free to say: "the interstate compact is the instrument best suited for the establishment of permanent arrangements among the states . . . ." Zimmerman and Wendell at 40.

Because interstate compacts are still "offsprings of a marriage between sovereign partners, each extremely reluctant to relinquish its sovereignty . . .", *California ex rel. Younger v. Tahoe Regional Planning Agency*, 516 F.2d 215, 218 (9th Cir.), *cert. denied*, 423 U.S. 868 (1975), states continue to control the administration and execution of interstate compacts after ratification.[18] Most importantly, states control compact actions

[18]They appoint the members of commissions and set their terms. They appropriate the money to administer the compacts. They retain the right to investigate the activities of the compact commission. Leach and Sugg at 25-41. All of this is true of the Pecos River Compact. Article V(a), (b) and (e).

by establishing voting procedures which protect the states' interests. Leach and Sugg at 25-41. Compacts in general operate under variations of the unanimity rule.[19] The Pecos River Compact is one of those requiring unanimity.[20]

The Pecos River Compact makes agreement of the states essential. The Pecos River is difficult and the Compact administration is correspondingly complex. For this reason, the states retained control and required unanimity. In 1949 when Texas and New Mexico ratified the Pecos River Compact, they knew that the requirement for unanimity might block Commission action; nevertheless, they did not give the federal representative a vote, and in the ensuing years neither state went to its legislature to propose that the Compact be modified. The states chose to make this unanimity requirement a term of the Compact and both states and courts should honor it.

If courts do not honor the terms of interstate compacts but instead feel free to rewrite them, compacts lose their mutually binding nature. This change would undermine the base on which

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[19]Zimmerman and Wendell at 48-49, referring to a study in Vawter, INTERSTATE COMPACTS — THE FEDERAL INTEREST (1954); *see also* Muys, INTERSTATE WATER COMPACTS 14 (1971).

For compacts requiring unanimity, *see e.g.*, Arkansas River Basin Compact, Art. X(D), 80 Stat. 1409, 1413 (1966); Belle Fourche River Compact, Art. III, 58 Stat. 94, 96 (1944); Big Blue River Compact, Art. III, §3.3, 86 Stat. 193, 195 (1972); Canadian River Compact, Art. IX(a), 66 Stat. 74, 77 (1952); Costilla Creek Compact, 60 Stat. 246, 254 (1946); La Plata River Compact, Art. III, 43 Stat. 796, 797 (1925); Rio Grande Interstate Compact, Art. XII, 53 Stat. 785 (1939). Not all compacts, however, require unanimity, and some designate the federal representative as a tie-breaker. *E.g.*, Yellowstone River Compact, Art. III(F), 65 Stat. 663, 666 (1951); Snake River Compact, Art. VI(C), 64 Stat. 29, 32 (1950).

[20]Pecos River Compact, Article V(a) (each state has one vote); S. Doc. No. 109 at 124 (Meeting of Dec. 3, 1948) (Unanimity required for Commission action); Commission Rules of Internal Organization, Article IV, Clause 9, Stip. Ex. 4 at 212 (Commission meeting, Oct. 29, 1960) (Commissioners of signatory states must concur in any action taken by Commission).

all interstate compacts are built. States could then go to court to escape selected provisions or to change to their advantage certain compact terms, hopeful that the court will grant them some relief if they persist.

Here, when Texas became dissatisfied with her entitlement under the Pecos River Compact, she repudiated the Commission's work, Stip. Ex. 4 at 472 (Commission meeting, Feb. 21, 1974), and filed suit. First she asked the Court to undo the agreements of the Commission; when that failed, she urged the Court to engraft on the Compact an altogether new method of administration, one contrary to its express terms.[21] For over eight years Texas pursued the Court to change what the Commission had done or what the Compact required, without freeing New Mexico of her covenants under the Compact. The Master in frustration has finally been moved to recommend that the Court change the Compact terms and then send the complaining party back to the Pecos River Compact Commission table. Report and Recommendations at 2-3 (filed Oct. 18, 1982).

Although the Master recommends that the Court return the matter to the Commission, he proposes that the Court first rewrite the critical voting provision in the Compact by giving the federal representative or some third party a tie-breaking vote on the Compact Commission. He suggests that this relief is acceptable because the states must have expected courts to provide some such mechanism for resolution of disputes. Report and Recommendations at 25-26. The compacting states, however, contemplated judicial review, not revision.

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[21] The agreement she sought to undo was the Commission's agreement to approve the Review of Basic Data. This effort was rejected by the Court. 446 U.S. 540 (1980). Then Texas sought to have the Court engraft on the Compact a new method, double mass diagramming, to replace the Review of Basic Data. *E.g.*, Texas Paragraph 4(b) Submission (dated April 13, 1981).

The proposed solution of giving the federal representative or other third party a vote even though the Compact forbids it, threatens to destabilize the base of values on which interstate compacts are built. It erodes the public policy of fostering such accommodations between states. Although the proposal is an effort to serve the states, it overlooks their sovereignty and casts aside their sovereign choices. The proposed solution, in attempting to solve a specific problem, promises to cause much larger ones.

Moreover, the Master's proposal will likely fail to cure even the specific problem it seeks to address. The proposal, if accepted, may end up disposing of the problem without resolving it.[22] As the Master sees it, the difficulty is that the states have not been able to agree. Therefore, the solution he proposes is quite simple: add a third-party vote to break any deadlocks. It is a numerical solution to the problem and might appear to dispose of it tidily.

The difficulty is that the mathematical solution is not likely to end the disputes. A third party with controlling decision-making power under the Compact foisted on the states will not prevent the parties from returning to the Court to challenge each decision they question. Providing a method of getting a majority vote under the Compact will not end the disputes. The states themselves must both agree to accept a solution. Ultimately, the effective functioning of a compact turns on the states' willingness to act, not on compulsion. Leach, "The Federal Government and Interstate Compacts," 29 Fordham L. Rev. 421, 426 (1961).

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[22]Former Attorney General Griffin Bell, commenting on some of the difficulties of the judicial process, once noted: "It perhaps can be said that courts on occasion simply dispose of disputes more often than resolve them." Bell and Adamson, "Notes on the Situation," 462 The Annals of the American Academy of Political and Social Science 23 (July 1982).

No matter what the instrument of settlement, states have to accept the solution in order to abide by it. In *Wyoming v. Colorado*, for example, litigation continued for thirty-five years after the Court's decision, until the states themselves reached an accommodation. The Court equitably apportioned the waters of the Laramie River between Colorado and Wyoming in 1922, 259 U.S. 419, 260 U.S. 1; but disputes continued in the ensuing decades, 286 U.S. 494 (1932), 298 U.S. 573 (1936), 309 U.S. 572 (1940), until the parties finally agreed upon a decree to replace the first one. 353 U.S. 953 (1957). Legal compulsion, even in an equitable apportionment suit, did not quiet the difficulties. It tends to be even less effective under a compact, where parties must continue to administer resources cooperatively.

The proposal to give the federal representative or other third party voting power under the Pecos River Compact should, therefore, be rejected first, because it asks the judiciary to rewrite the Compact in excess of the judicial powers; second, because such judicial rewriting of compacts threatens to destabilize interstate compacts; and, third, because the proposed judicial rewriting would not likely resolve the disputes here.

II.
THE MASTER ERRED IN CONCLUDING THE COURT COULD OFFER NO RELIEF OTHER THAN REWRITING THE COMPACT BECAUSE THE COURT CAN AND SHOULD DECIDE THE JUSTICIABLE DISPUTES BEFORE IT.

Although the Court may not rewrite the Compact, it can and should review the disputed elements of the Commission's findings of fact. The Commission made findings of fact which later displeased Texas and led to this lawsuit. Instead of urging the Court to review the Commission's findings, though, Texas

has been encouraging the Court to change the Compact.[23] So long as Texas disputes the validity of the Commission's findings, those findings should be judicially reviewed.

In the confusion of this lawsuit, however, the Master decided not to proceed with review of the issues pertaining to the Commission's earlier findings. In making that decision, the Master wandered from the proper course. The Court should return the case to the Master with direction to proceed with review of the findings of fact that have been made by the Commission. A judicial decision on those issues would restore the Commission to its function. If, however, the Court agrees with the Master that judicial review of the Commission's findings is no longer relevant, then there are no justiciable issues left and the case should be returned to the Commission.

A. The Court Should Direct the Master to Review the Commission's Findings of Fact.

The Pecos River Compact delegates to the Commission the power to make findings on facts needed for administration of the Compact. Article V(d). The Compact authorizes the Commission to determine how much water should have crossed the state line each year under the 1947 condition, how much in fact crossed the line, and whether any deficiencies in the amount crossing the state line resulted from man's activities in New Mexico. This delegation of power under the Compact is no more than a customary delegation of power from a legislative body to an administrative agency. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 30-31 (1951).

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[23] *E.g.*, Texas' Motion to Use Double Mass Inflow-Outflow Method to Account for Stream Flows in the Determination of the 1947 Condition Base Relationship (dated Jan. 15, 1982).

The Commission's findings of fact under the Pecos River Compact are reviewable in court. Article V(f). Judicial review of a compact agency's findings proceeds in accordance with compact terms. *See e.g., Williams v. Washington Metropolitan Area Transit Commission*, 415 F.2d 922 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969); *D.C. Transit System v. Washington Metropolitan Area Transit Commission*, 350 F.2d 753 (D.C. Cir. 1965), *cert. denied*, 389 U.S. 847 (1967); *Brown v. Tahoe Regional Planning Agency*, 385 F. Supp. 1128 (D. Nev. 1973). Under the Pecos River Compact, "Findings of fact made by the Commission . . . shall constitute prima facie evidence of the facts found." Article V(f).

The Pecos River Commission made findings of fact in 1962.[24] The Commission considered whether Texas had received the proper amount of water under the Compact in the twelve years since Compact administration began. The Commission decided Texas' supply had been deficient by only 5,300 acre feet over the entire period of 1950 through 1961. It did not decide whether New Mexico uses, rather than natural causes, were responsible for this relatively small deficiency.[25] Instead, the Commission stopped at determining the overall deficiency and adopted those conclusions as formal findings of fact under the Compact. Stip. Ex. 4 at 256-58 (Commission meeting, Nov. 9, 1962).

Years later, through a new Commissioner, Texas decided she disagreed with those findings of fact and she filed suit challenging the basis of the findings. *See* Pre-Trial Order, Paragraph 4(a) and (b) (entered Oct. 31, 1977). The technical basis of the

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[24]The Pecos River Commission also made findings of fact in 1961. Stip. Ex. 4 at 247 (Commission meeting, Jan. 31, 1961). The 1962 findings of fact, however, corrected and expanded those made in 1961.

[25]New Mexico would be responsible under the Compact only if the deficiency were caused by man's activities in New Mexico, as opposed to natural causes. Article III(a).

findings is a document known as the Review of Basic Data. The Commission's engineers had developed the Review of Basic Data specifically for the purpose of enabling the Commission to make such findings of fact. *See* Stip. Ex. 4 at 247-48 (Commission meeting, Jan. 31, 1961, where the Commission adopted the Review of Basic Data for use in Commission findings).

The disputed issues concerning the Review of Basic Data and the parties' evidence on those issues have now been fully put before the Master in two segments of trial, one in 1978 and one in March 1982.[26] Only a few disputes remain. *E.g.*, 42 Tr. 4189 l. 15 (March 12, 1982); New Mexico Exhibit 54 at 4 (New Mexico's Statement Regarding Basic Facts, Unmeasured Values and Techniques for Determining Stream Flows as Required by the Special Master's December 29, 1981 Order, filed Feb. 19, 1982). The Master should be directed to decide the remaining disputes, taking the Commission's findings of fact, under Article V(f) of the Pecos River Compact, as prima facie evidence of the facts found.

If the Court decides the disputed issues underlying the Commission's findings of fact and completes its judicial review, the Commission can return to work. The technical basis of its findings will either be upheld or remanded with infirmities specified for correction. Judicial review will fix the lawfulness of

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[26] Before the trial in 1982, the Master vacated the portion of the Pre-Trial Order that set out the issues raised by Texas' technical challenges to the Review of Basic Data. He instead ordered the parties to go to trial on "basic facts, unmeasured values and techniques" needed for determining stream flows and administering the river. Order of December 29, 1981. In response, the states presented their evidence on the Review of Basic Data issues. 40 Tr. 3940 through 43 Tr. 4393 (March 10-15, 1982); New Mexico Exhibit 54 (New Mexico's Statement Regarding Basic Facts, Unmeasured Values and Techniques for Determining Stream Flows as Required by the Special Master's December 29, 1981 Order, filed Feb. 19, 1982); Texas Exhibit 48 (Texas' Statement on Basic Facts, Unmeasured Values and Techniques, with associated reports, filed Jan. 18, 1982).

the Commission's past actions and give direction to the Commission's future actions.

The Master suggests, however, that judicial review of these issues would be advisory, and therefore improper, because one Commissioner or the other will always block Commission action by using the one-state veto. Report and Recommendations at 21-22. The Master's suggestion is speculative and no basis on which to deny judicial review of the Commission's findings. The Commission stopped functioning not because of the one-state veto provision, but because Texas was dissatisfied with the Commission's findings. So long as Texas questions the Commission's findings, the Court should proceed with its review and put these matters to rest. There is no reason to believe that Texas will disregard the Court's decisions when review has been completed; but even if roadblocks were expected to arise later, the Court would not be absolved from deciding the justiciable issues before it now.

The Master also quarrels with the notion that the Review of Basic Data is still available for Commission use. He decided the Review of Basic Data was developed to be used in findings only for the period 1950 through 1961.[27] Report and Recommendations at 20 (filed Oct. 18, 1982). The Master is in error and New Mexico urges the Court to reject the Master's recommended decision. The Commission's purpose in undertaking the long and difficult study that led to the Review of

[27]The Master made a similar comment at 40-41 in his 1979 Report to this Court, but New Mexico did not bring it to this Court's attention then because it did not appear to be a finding of fact on that portion of the case; the Master himself had pointed out that "We have not reached the point in the case where the effect of the Texas approval of the [Review of Basic Data] for the determination of 1950-61 departures is significant." Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact at 41 (filed Oct. 15, 1979).

Basic Data was to correct basic information about the river so that the Commission could administer the river. *E.g.*, Stip. Ex. 4 at 174, 247 (Commission meetings, July 29, 1957 and Jan. 31, 1961). The Commission, did not intend to apply the Review of Basic Data only to the findings made in 1962; it never said that its work was to be set aside one year after completion, nor would it have been reasonable to undertake this task only for the purpose of throwing it out a year later. On the contrary, the Commission adopted the Review of Basic Data for "all actions and findings of the Commission." Stip. Ex. 4 at 247 (Commission meeting, Jan. 31, 1961).

In any event, these objections are not the reasons the Master gave for vacating the segments of the Pre-Trial Order providing for judicial review of the Review of Basic Data. The reasons he gave are three:

> (1) the failure of the States either to agree or to state their final positions on the issues posed by [Paragraph] 4(b); (2) the Texas rejection of both the 1947 routing study and [the Review of Basic Data] as a method of Compact administration ended the need for consideration of the differences between the 1947 routing study and [the Review of Basic Data]; and (3) a new inflow-outflow manual was necessary.

Report and Recommendations at 10-11 (filed Oct. 18, 1982). Each of the three reasons is in error. First, although Texas delayed long in doing so,[28] the parties did state their positions on

[28] Even though Texas delayed the lawsuit for years, *see* Report and Recommendations at 9-10, the Master suggests that delay in resolution of this suit serves New Mexico. Report and Recommendations at 15. New Mexico wants the dispute resolved. The uncertainty this litigation has produced is no aid to New Mexico.

the Review of Basic Data and reached agreement on most of the points.[29] Second, Texas continued to pursue her objections to the disputed parts of the Review of Basic Data after she proposed a new method of Compact administration; she contested those issues at trial in March of 1982 in the event her efforts to have the Court impose a new method failed, so the issues in Paragraph 4(b) of the Pre-Trial Order did not become irrelevant. 40 Tr. 3940 through 43 Tr. 4393. Third, the development of an inflow-outflow manual is not a prerequisite to review of the 1962 findings of fact or the Review of Basic Data, on which the findings were based, because both the findings and the Review of Basic Data were adopted without the development of an inflow-outflow manual. The inflow-outflow manual is only a guidebook; and in this instance, it would have been only a guidebook of procedures drawn from the Review of Basic Data.

Thus, the Master erred in refusing to proceed with his review of the decisions the Commission made. The Court should direct the Master to complete his review of the Commission's findings so the parties will know where they stand and the Commission can go back to work with the benefit of judicial decisions to guide its course.

B. If the Master Does Not Review the Commission's Findings, There Is Nothing Left for the Court to Review and the Court Should Return the Matter to the Commission.

If the Court agrees with the Master that the Master need not proceed with review of the Commission's findings and that the

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[29] *See* 40 Tr. 3940 through 43 Tr. 4393 (March 10-15, 1982); New Mexico Exhibit 54 (New Mexico's Statement Regarding Basic Facts, Unmeasured Values and Techniques for Determining Stream Flows as Required by the Special Master's December 29, 1981 Order, filed Feb. 19, 1982); Texas Exhibit 48 (Texas' Statement on Basic Facts, Unmeasured Values and Techniques, filed Jan. 18, 1982); 24 Tr. 3293, 3314 (Hearing, October 20, 1980); Master's Exhibits 12, 17, 18 (Letters describing the parties' agreements and disagreements); Affidavit of Carl L. Slingerland, dated December 11, 1981, paragraph 9 (Affidavit attached to New Mexico's Objections to Special Master's Order of December 1, 1981, dated Dec. 15, 1981).

issues challenging portions of the Review of Basic Data are no longer relevant, there is nothing left for the Court to review and the case should be dismissed. New Mexico moved to dismiss this case when the Master excluded the Commission's findings from the case because the Court could not go forward by making, on its own, the administrative findings of fact delegated to the Commission. *See* New Mexico's Motion to Recommend Final Decree and to Dismiss, and supporting memorandum (filed Feb. 19, 1982). Because the Master would not review the Commission's findings and could not make *de novo* administrative findings, no judicial function remained. The Master agrees courts may not take on the functions of an agency and make decisions delegated to the agency; nevertheless, he does not recommend dismissal of the case. Report and Recommendations at 2, 22-23.

It is fundamental that a court may exercise judicial powers only. *E.g., Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 469 (1930) (the Supreme Court cannot "exercise or participate in the exercise of functions which are essentially legislative or administrative"); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923) (the Supreme Court dismissed the appeal because its jurisdiction under Article III of the Constitution did not extend to administrative functions). If a jury were charged with making a finding of fact but did not do so, the appellate court could not take the place of the jury and make findings of fact in its stead; similarly, if an administrative agency is charged with issuing an order, the court may not issue the administrative order in its stead. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

Courts may not even substitute their judgments on administrative matter for those of the agency when conducting judicial review. *E.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978) (Court may not substitute its judgment for that of agency as to

environmental consequences of proposed action); *Federal Communications Commission v. Schreiber*, 381 U.S. 279, 290-91 (1965) (Court may not establish administrative procedure *de novo*); *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20-21 (1952) (Court may not modify terms of license issued by agency); *Public Service Commission v. Havemeyer*, 296 U.S. 506, 517-18 (1936) (Court may not substitute its own views for that of commission on revocation of a franchise).

Even if all of the parties involved want the Court to take on an administrative role, it may not do so. In *Vermont v. New York*, 417 U.S. 270 (1974) (per curiam), the parties proposed and the Master recommended a consent decree in which they sought appointment of a Special Master to rule on any contested matters that might arise in the execution of the decree. The Court declined to approve the decree because the Court, under Article III of the Constitution, may exercise only judicial power; and the Special Master's functions under the proposed decree might have no relation to the application of law or equity to facts. "Insofar as we would be supervising the execution of the Consent Decree, we would be acting more in an arbitral rather than a judicial manner." 417 U.S. at 277.

There is danger in courts exceeding their judicial power and absorbing legislative or administrative functions. Justice Marshall, when confronted with the difficult decision of whether to vacate a stay of a District Court decision enjoining United States air operations in Cambodia, observed:

> When the final history of the Cambodian war is written, it is unlikely to make pleasant reading. The decision to send American troops "to distant lands to die of foreign fevers and foreign shot and shell". . . may ultimately be adjudged to have been not only unwise but also unlawful.

> But the proper response to an arguably illegal action is not lawlessness by judges . . . . Down that road lies tyranny and repression.

Holtzman v. Schlesinger, 414 U.S. 1304, 1315 (1973). Similarly, Judge Holtzoff warned:

> We would be lacking in clarity of thought if we did not realize that such a development would transform the judiciary from a coordinate branch into a superior and all powerful organ of the government. The supreme power of the government would then be lodged in the Federal courts, composed of judges holding permanent tenure. Our government would cease to be a Republic.

Protestants and Other Americans United for Separation of Church and State v. O'Brien, 272 F. Supp. 712, 717 (D.D.C. 1967). The Court, therefore, restrains itself, acts as a check on its own power, and so ensures that ours is a government of limited powers.

Here the Court would be reaching well beyond its judicial powers under Article III of the Constitution if it discarded judicial review of Commission findings and proceeded, *de novo*, to make findings of fact delegated to the Commission. The interstate compact here authorizes the Commission, not the courts, to make administrative findings under the Compact. Articles V and VI. Making those findings is a function of engineering and hydrology, not law. The Court has neither the role nor special expertise to lend in making the administrative findings *de novo*. If the Court will not review the Commission's findings and may not make its own findings, it has no further function to perform and should return the matter to the Pecos River Commission.

If the Court does return the matter to the Commission, New Mexico will recommend to Texas that a mutually agreeable mediator be employed under Article V(c) of the Compact to assist the Commission in resuming its function. There is precedent for mediation under the Compact: Mr. Tipton, Chairman of the Engineering Advisory Committee, served the Commission well by mediating engineering disputes and differences from 1949 until his death in 1967. Moreover, mediation bears a good chance of success because the Commissioners associated with the litigation have left.[30] Therefore, if the matter is remanded to the Commission, New Mexico will propose this extra measure to enhance the likelihood of the Commission's success in turning from litigation to peaceful accommodation.

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[30]Texas Commissioner McGowen, who struck an independent path away from the joint work of the Commission and brought the states to this litigation, has been replaced. The New Mexico representative who served as Commissioner for most of the course of this litigation, resigned at the end of October, 1982.

CONCLUSION

The Master's recommendation that the Court grant voting power on the Pecos River Compact Commission to the federal representative or some other third party should be rejected because courts may not rewrite interstate compacts. Instead of foisting a third party tie-breaker on the Commission, the Court should proceed with judicial review of the Commission's findings. Alternatively, the Court should dismiss the case and allow the matter to return to the Commission.

Respectfully submitted,

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APPENDIX

PECOS RIVER COMPACT

The State of New Mexico and the State of Texas, acting through their Commissioners,

John H. Bliss for the State of New Mexico and
Charles H. Miller for the State of Texas,

after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting the uses, apportionment and deliveries of the water of the Pecos River as follows:

ARTICLE I

The major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Pecos River; to promote interstate comity; to remove causes of present and future controversies; to make secure and protect present development within the states; to facilitate the construction of works for, (a) the salvage of water, (b) the more efficient use of water, and (c) the protection life and property from floods.

ARTICLE II

As used in this Compact:

(a) The term "Pecos River" means the tributary of the Rio Grande which rises in north-central New Mexico and flows in a southerly direction through New Mexico and Texas and joins the Rio Grande near the town of Langtry, Texas, and includes all tributaries of said Pecos River.

(b) The term "Pecos River Basin" means all of the contributing drainage area of the Pecos River and its tributaries above its mouth near Langtry, Texas.

(c) "New Mexico" and "Texas" means the State of New Mexico and the State of Texas, respectively; "United States" means the United States of America.

(d) The term "Commission" means the agency created by this Compact for the administration thereof.

(e) The term "deplete by man's activities" means to diminish the stream flow of the Pecos River at any given point as a result of beneficial consumptive uses of water within the Pecos River Basin above such point. For the purposes of this Compact it does not include the diminution of such flow by encroachment of salt cedars or other like growth, or by deterioration of the channel of the stream.

(f) The term "Report of the Engineering Advisory Committee" means that certain report of the Engineering Advisory Committee dated January, 1948, and all appendices thereto; including, basic data, processes, and analyses utilized in preparing that report, all of which were reviewed, approved, and adopted by the Commissioners signing this Compact at a meeting held in Santa Fe, New Mexico, on December 3, 1948, and which are included in the Minutes of that meeting.

(g) The term "1947 condition" means that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee. In determining any question of fact hereafter arising as to such situation, reference shall be made to, and decisions shall be based on, such report.

(h) The term "water salvaged" means that quantity of water which may be recovered and made available for beneficial use and which quantity of water under the 1947 condition was non-beneficially consumed by natural processes.

(i) The term "unappropriated flood waters" means water originating in the Pecos River Basin above Red Bluff Dam in Texas, the impoundment of which will not deplete the water usable by the storage and diversion facilities existing in either state under the 1947 condition and which if not impounded will flow past Girvin, Texas.

ARTICLE III

(a) Except as stated in paragraph (f) of this Article, New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

(b) Except as to the unappropriated flood waters thereof, the apportionment of which is included in and provided for by paragraph (f) of this Article, the beneficial consumptive use of the waters of the Delaware River is hereby apportioned to Texas, and the quantity of such beneficial consumptive use shall be included in determining waters received under the provisions of paragraph (a) of this Article.

(c) The beneficial consumptive use of water salvaged in New Mexico through the construction and operation of a project or projects by the United States or by joint undertakings of Texas and New Mexico, is hereby apportioned forty-three per cent (43%) to Texas and fifty-seven per cent (57%) to New Mexico.

(d) Except as to water salvaged, apportioned in paragraph (c) of this Article, the beneficial consumptive use of water which shall be non-beneficially consumed, and which is recovered, is hereby apportioned to New Mexico but not to have the effect of diminishing the quantity of water available to Texas under the 1947 condition.

(e) Any water salvaged in Texas is hereby apportioned to Texas.

(f) Beneficial consumptive use of unappropriated flood waters is hereby apportioned fifty per cent (50%) to Texas and fifty per cent (50%) to New Mexico.

ARTICLE IV

(a) New Mexico and Texas shall cooperate to support legislation for the authorization and construction of projects to eliminate non-beneficial consumption of water.

(b) New Mexico and Texas shall cooperate with agencies of the United States to devise and effectuate means of alleviating the salinity conditions of the Pecos River.

(c) New Mexico and Texas each may:

(i) Construct additional reservoir capacity to replace reservoir capacity made unusable by any cause.

(ii) Construct additional reservoir capacity for utilization of water salvaged and appropriated flood water apportioned by this Compact to such state.

(iii) Construct additional reservoir capacity for the purpose of making more efficient use of water apportioned by this Compact to such state.

(d) Neither New Mexico nor Texas will oppose the construction of any facilities permitted by this Compact, and New Mexico and Texas will cooperate to obtain the construction of facilities that will be of joint benefit to the two states.

(e) The Commission may determine the conditions under which Texas may store water in works constructed in and operated by New Mexico.

(f) No reservoir shall be constructed and operated in New Mexico above Avalon Dam for the sole benefit of Texas unless the Commission shall so determine.

(g) New Mexico and Texas each has the right to construct and operate works for the purpose of preventing flood damage.

(h) All facilities shall be operated in such manner as to carry out the terms of this Compact.

ARTICLE V

(a) There is hereby created an interstate administrative agency to be known as the "Pecos River Commission." The Commission shall be composed of one Commissioner representing each of the states of New Mexico and Texas, designated or appointed in accordance with the laws of each such state, and, if designated by the President, one Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the two states. On or before November 1 of each even numbered year the Commission shall adopt and transmit to the Governors of the two states and to the President a budget covering an estimate of its expenses for the following two years. The payment of the expenses of the Commission and of its employees shall not be subject to the audit and accounting procedures of either of the two states. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified independent public accountant and the report of the audit shall be included in, and become a part of, the annual report of the Commission.

(c) The Commission may appoint a secretary who, while so acting, shall not be an employee of either state. He shall serve for such term, receive such salary, and perform such duties as the Commission may direct. The Commission may employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact. In the hiring of employees the Commission shall not be bound by the civil service laws of either state.

(d) The Commission, so far as consistent with this Compact, shall have power to:

1. Adopt rules and regulations;

2. Locate, establish, construct, operate, maintain, and abandon water gaging stations, independently or in cooperation with appropriate governmental agencies;

3. Engage in studies of water supplies of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

4. Collect, analyze, correlate, preserve and report on data as to the stream flows, storage, diversions, salvage, and use of the waters of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

5. Make findings as to any change in depletion by man's activities in New Mexico, and on the Delaware River in Texas;

6. Make findings as to the deliveries of water at the New Mexico-Texas state line;

7. Make findings as to the quantities of water salvaged and the amount thereof delivered at the New Mexico-Texas state line;

8. Make findings as to quantities of water non-beneficially consumed in New Mexico;

9. Make findings as to quantities of unappropriated flood waters;

10. Make findings as to the quantities of reservoir losses from reservoirs constructed in New Mexico which may be used for the benefit of both states, and as to the share thereof charged under Article VI hereof to each of the states;

11. Acquire and hold such personal and real property as may be necessary for the performance of its duties hereunder and to dispose of the same when no longer required;

12. Perform all functions required of it by this Compact and do all things necessary, proper or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies;

13. Make and transmit annually to the Governors of the signatory states and to the President of the United States on or before the last day of February of each year, a report covering the activities of the Commission for the preceding year.

(e) The Commission shall make available to the Governor of each of the signatory states any information within its possession at any time, and shall always provide free access to its records by the Governors of each of the States, or their representatives, or authorized representatives of the United States.

(f) Findings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute prima facie evidence of the facts found.

(g) The organization meeting of the Commission shall be held within four months from the effective date of this Compact.

ARTICLE VI

The following principles shall govern in regard to the apportionment made by Article III of this Compact:

(a) The report of the Engineering Advisory Committee, supplemented by additional data hereafter accumulated, shall be used by the Commission in making administrative determinations.

(b) Unless otherwise determined by the Commission, depletions by man's activities, state-line flows, quantities of

water salvaged, and quantities of unappropriated flood waters shall be determined on the basis of three-year periods reckoned in continuing progressive series beginning with the first day of January next succeeding the ratification of this Compact.

(c) Unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method, as described in the Report of the Engineering Advisory Committee, shall be used to:

(i) Determine the effect on the state-line flow of any change in depletions by man's activities or otherwise, of the waters of the Pecos River in New Mexico.

(ii) Measure at or near the Avalon Dam in New Mexico the quantities of water salvaged.

(iii) Measure at or near the state line any water released from storage for the benefit of Texas as provided for in sub-paragraph (d) of this Article.

(iv) Measure the quantities of unappropriated flood waters apportioned to Texas which have not been stored and regulated by reservoirs in New Mexico.

(v) Measure any other quantities of water required to be measured under the terms of this Compact which are susceptible of being measured by the inflow-outflow method.

(d) If unappropriated flood waters apportioned to Texas are stored in facilities constructed in New Mexico, the following principles shall apply:

(i) In case of spill from a reservoir constructed in and operated by New Mexico, the water stored to the credit of Texas will be considered as the first water to spill.

(ii) In case of spill from a reservoir jointly constructed and operated, the water stored to the credit of either state shall not be affected.

(iii) Reservoir losses shall be charged to each state in proportion to the quantity of water belonging to that State in storage at the time the losses occur.

(iv) The water impounded to the credit of Texas shall be released by New Mexico on the demand of Texas.

(e) Water salvaged shall be measured at or near the Avalon Dam in New Mexico and to the quantity thereof shall be added a quantity equal to the quantity of salvaged water depleted by man's activities above Avalon Dam. The quantity of water salvaged that is apportioned to Texas shall be delivered by New Mexico at the New Mexico-Texas state line. The quantity of unappropriated flood waters impounded under paragraph (d) of this Article, when released shall be delivered by New Mexico at the New Mexico-Texas state line in the quantity released less channel losses. The unappropriated flood waters apportioned to Texas by this Compact that are not impounded in reservoirs in New Mexico shall be measured and delivered at the New Mexico-Texas state line.

(f) Beneficial use shall be the basis, the measure, and the limit of the right to use water.

ARTICLE VII

In the event of importation of water by man's activities to the Pecos River Basin from any other river basin the state making the importation shall have the exclusive use of such imported water.

ARTICLE VIII

The provisions of this Compact shall not apply to, or interfere with, the right or power of either signatory state to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact.

ARTICLE IX

In maintaining the flows at the New Mexico-Texas state line required by this Compact, New Mexico shall in all instances apply the principle of prior appropriation within New Mexico.

ARTICLE X

The failure of either state to use the water, or any part thereof, the use of which is apportioned to it under the terms of this Compact, shall not constitute a relinquishment of the right to such use, nor shall it constitute a forfeiture or abandonment of the right to such use.

ARTICLE XI

Nothing in this Compact shall be construed as:

(a) Affecting the obligations of the United States under the Treaty with the United Mexican States (Treaty Series 994);

(b) Affecting any rights or powers of the United States, its agencies or instrumentalities, in or to the waters of the Pecos River, or its capacity to acquire rights in and to the use of said waters;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any state or subdivision

thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any state or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(d) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any state to an extent other than the extent to which such laws would apply without regard to this Compact.

ARTICLE XII

The consumptive use of water by the United States or any of its agencies, instrumentalities or wards shall be charged as a use by the state in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one state for use in the other state shall be charged to such latter state.

ARTICLE XIII

This Compact shall not be construed as establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XIV

This Compact may be terminated at any time by appropriate action of the legislatures of both of the signatory states. In the event of such termination, all rights established under it shall continue unimpaired.

ARTICLE XV

This Compact shall become binding and obligatory when it shall have been ratified by the legislature of each State and approved by the Congress of the United States. Notice of ratification by the legislature of each State shall be given by the Governor of that State to the Governor of the other State and to the President of the United States, and the President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have executed three counter-parts hereof each of which shall be and constitute an original, one of which shall be deposited in the archives of the Department of State of the United States, and one of which shall be forwarded to the Governor of each State.

Done at the City of Santa Fe, State of New Mexico, this 3rd day of December, 1948.

JOHN H. BLISS
Commissioner for the State of New Mexico

CHARLES H. MILLER
Commissioner for the State of Texas

APPROVED

BERKELEY JOHNSON
Representative of the United States of America